1992

Shelly Hipwell v. Roger Sharp, Tim W. Healy, and Does I through X : Reply Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

5

IN THE UTAH SUPREME COURT

SHELLY HIPWELL, an individual by and through her guardians, SHERRIE JENSEN and SHAYNE HIPWELL,	)	
Plaintiffs/Respondents,	)	Supreme Court No. 920218
vs.	)	Priority No. 11
ROGER SHARP, TIM W. HEALY, and DOES I THROUGH X,	)	
Defendants/Appellants.	)	

REPLY BRIEF OF APPELLANT ROGER SHARP

Interlocutory Appeal from the Order of the Third Judicial District Court
Salt Lake County, State of Utah
Honorable J. Dennis Frederick, Presiding

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CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Const., art. I §§ 7, 11, and 24; art. V § 1.

Utah Code Ann. §§ 63-30-2(3), (4), & (9); 63-30-3; 63-30-34.

INTRODUCTION

To avoid summary judgment plaintiff Shelly Hipwell must prove beyond a reasonable doubt that the 1987 version of the Utah Governmental Immunity Act ("UGIA") is unconstitutional. Plaintiff's opposing brief fails to raise a single argument that is sufficient to satisfy her burden of proof on this point. As shown below, every argument asserted by plaintiff is fatally flawed.

RESPONSE TO PLAINTIFF'S "STATEMENT OF THE CASE"

At the trial level defendant Sharp relied upon two different amendments to the UGIA in support of his motion for summary judgment -- the 1987 amendment and the 1991 amendment.[1] To avoid

[1] The 1987 amendment (§ 63-30-2(4)) and the 1991 amendment (§ 63-30-3(2)(a)) both included the activities of the University Hospital within the definition of "governmental function." Because Shelly Hipwell's injury occurred in 1988, this case is controlled by the 1987 amendment. Defendant has not raised the issue of the 1991 amendment on this appeal to avoid retroactivity arguments.

summary judgment plaintiff had to prove that both of these amendments were unconstitutional. However, plaintiff's opposing memorandum focused exclusively on the 1991 amendment. Plaintiff's only reference to the 1987 amendment was contained in a single-sentence footnote that concluded without support that the 1987 amendment is "clearly invalid." (R. 646). Plaintiff has recently attempted to dismiss her complete failure to discuss the 1987 amendment by alleging that the principal argument raised by Sharp was the 1991 amendment and that the 1987 amendment was raised by Sharp only "in passing." (Appellee's Brief, p. 5). This is absolutely untrue, as reflected by the record.

In his supporting brief defendant Sharp fully set forth the text of both the 1987 and 1991 amendments. Significantly, the text of the 1987 amendment was set forth first. (R. 552). Throughout the entire remaining portion of his memorandum Sharp always referred to the 1987 and 1991 amendments in tandem. Additionally, in every reference to the two amendments, the 1987 amendment was always identified first. (See R. 555, 561, 565, 567, 577). Plaintiff has no basis for alleging that the 1987 amendment was raised "in passing." Plaintiff failed to address the 1987 amendment and therefore failed to prove beyond a reasonable doubt that the amendment is unconstitutional. The trial court obviously erred

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At the trial level plaintiff used the greater portion of her opposing memorandum to argue that the 1991 amendment cannot be applied retroactively. Defendant responded by citing Frank v. State, 613 P.2d 517 (Utah 1980), which applied the 1978 amendment retroactively to conclude that the University Hospital performed "governmental functions." Plaintiff admitted the facts necessary to invoke the 1991 amendment. (R.166, 334-35).

in finding the 1987 amendment unconstitutional "for the reasons specified in plaintiff's memoranda." (R. 725).

RESPONSE TO PLAINTIFF'S "ARGUMENT"

As shown below, plaintiff's brief fails to present a single argument sufficient to avoid summary judgment. For the convenience of the Court defendant will respond to each of plaintiff's arguments in the order they were presented. The headings below correspond to the headings used in plaintiff/appellee's brief.

A. THE DAMAGE LIMITATION DOES NOT VIOLATE "THE OPEN-COURTS" PROVISION OF THE UTAH CONSTITUTION.

Plaintiff argues that the UGIA's liability limit of $250,000 violates the "open-courts" provision of the Utah Constitution because: 1) The governmental/proprietary distinction applied to state entities at common law; and 2) the UGIA deprives plaintiff of a remedy against state employees that existed at common law. Both of these arguments must fail.

1. The Governmental/Proprietary Distinction did not Apply to State Entities at Common Law.

The many authorities cited on pages 7-15 of Sharp's original brief show that the state was absolutely immune from suit at common law, absent consent to the contrary. The authorities further demonstrate that municipalities were immune for "governmental functions," but not for "proprietary functions." The governmental/proprietary distinction used to determine a municipality's immunity had no application to the state at common law.

Plaintiff responds by claiming that the authorities are split over whether the governmental/proprietary dichotomy applied to state entities at common law. In support, plaintiff string-cites

a number of cases. Not one of the cited cases supports plaintiff's position. The case relied upon most heavily by plaintiff is Hershel v. University Hosp. Found., 610 P.2d 237 (Okla. 1980). Hershel held that the State of Oklahoma was capable of performing "proprietary functions" under Oklahoma's governmental immunity act. Hershel did not hold that a state entity performed "proprietary functions" at common law. Indeed, the Oklahoma Supreme Court has subsequently acknowledged that Hershel represents a departure from the common law and has refused to apply Hershel retroactively. See Burns v. Rader, 723 P.2d 266, 267-68 (Okla. 1986); Fox v. Oklahoma Memorial Hosp., 774 P.2d 459, 461 (Okla. 1989).

Plaintiff also cites Hartford Accident & Indem. Co. v. Wainscott, 19 P.2d 328 (Ariz. 1933). However, Hartford did not hold that states were capable of performing "proprietary functions" at common law. Hartford did not even involve a suit against a government entity. Rather, Hartford acknowledged the differing treatment given to states and municipalities at common law. Id. at 330.

The remaining cases cited by plaintiff not only fail to support her position, but also provide direct support to defendant. See Henry v. Oklahoma Turnpike Auth., 478 P.2d 898, 901 (Okla. 1970) ("This state has long been committed to the rule, without a single exception, that the State is immune from suits without its waiver or consent", citing 18 cases); Union Trust Co. v. State, 99 P. 183, 188 (Cal. 1908) (even though a state might be liable for breach of contract, the state cannot be sued without its consent); McCoy v. Kenosha County, 218 N.W. 348 (Wis. 1928) (statutory

liability limit of $5,000 does not violate "open-courts" provision; courts should yield to legislature on governmental immunity issues); Bakken v. State, 219 N.W. 834, 835 (N.D. 1928) (state only liable because of statute providing that "civil actions may be brought against the state" for claims arising out of state's manufacturing of farm products.); Bank of United States v. The Planter's Bank of Georgia, 24 U.S. 904, 907-08 (1824) (government's ownership of stock in a private corporation does not prevent corporation from being sued; government itself cannot be sued); Green vs. Commonwealth, 435 N.E.2d 362 (Mass. App. 1982) (Governmental/Propriety distinction did not apply to state at common law).

Plaintiff tries to explain her inability to cite precedent by stating that no precedent exists because state entities historically did not perform any act that could be considered "proprietary" under governmental/proprietary analysis. In making this argument plaintiff contradicts her own prior assertion that the operation of a state hospital is "proprietary." The State of Utah operated a hospital as early as 1888. See Addendum, pp. A-5 to A-8.

In desperation plaintiff has attempted to shift the burden of proof to defendants/appellants: "Appellants have not and cannot point to any state activity at common law . . . that was even remotely proprietary in nature." (Appellee's Brief, p. 19). Plaintiff carries the burden of proving that the UGIA deprives her of a common law remedy against the state, not vice-versa. In any event, plaintiff is incorrect. A comparison of early Utah cases reveals instances in which state entities and municipalities performed the same types of activities, yet only the state was immune.

One example is the differing treatment given to states and municipalities for water supply activities. Whenever a municipality was sued at common law for injuries or property damage arising from the negligent construction or maintenance of canals and water courses, the Utah courts consistently held that such activities were "proprietary functions" to which governmental immunity did not extend. See e.g. Levy v. Salt Lake City, 3 Utah 63, 1 P. 160 (1881); Levy v. Salt Lake City, 5 Utah 302, 16 P. 598 (1888); Kiesel & Co. v. Ogden City, 8 Utah 237, 30 P. 758 (1892); Brown v. Salt Lake City, 33 Utah 222, 93 P. 570 (1908); Davis v. Midvale City, 56 Utah 1, 189 P. 74 (1920); Egelhoff v. Ogden City, 71 Utah 511, 267 P. 1011 (1928). However, when the state was sued for the same activity the suit was dismissed, as shown in Wilkinson v. State, 42 Utah 483, 134 P. 626 (1913).

The plaintiff in Wilkinson attempted to sue the state for defects in an irrigation reservoir and canal that broke and damaged the plaintiff's property. However, unlike the municipal cases the plaintiff's complaint in Wilkinson was summarily dismissed. The Utah Supreme Court explained that sovereign immunity prevented the very act of filing a complaint against the state without consent:

> In the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained. The doctrine is elementary and of universal application, and so far as we are aware there is not a single authority to the contrary.

Id. at 630, 42 Utah at 492-93.

The Court explained that sovereign immunity "shielded the state from being sued in the courts" and that without consent the

courts lacked jurisdiction to even entertain a suit against the state. Id. at 631, 42 Utah at 495.

The great weight of precedent demonstrates that common-law courts extended immunity to state entities without considering the entity's activities. This contrasted with the application of sovereign immunity to municipalities, where the courts looked past the entity and considered the activity.

B. PLAINTIFF HAS NOT PROPERLY ALLEGED OR PROVEN THAT THE UGIA DEPRIVES HER OF A REMEDY AGAINST STATE EMPLOYEES.

Plaintiff argues that the UGIA is unconstitutional because it deprives her of a common law remedy against state employees without providing an adequate substitute remedy. With respect to this argument it is important to understand the lower court proceedings.

Defendant's initial memorandum in support of summary judgment argued that plaintiff's settlement was reasonable as a matter of law because plaintiff was injured by an employee of the College of Medicine and that, even after Condemarin, the liability of the College of Medicine was limited to $250,000 under the UGIA. Plaintiff's opposing memorandum did not contest defendant's arguments, but rather argued that the University Hospital was also liable and that the liability limit was unconstitutional with regards to the University Hospital. Defendant's reply memorandum argued that, even if the University Hospital were liable, plaintiff's recovery would still be limited to $250,000 because of subsequent amendments that reinstated the liability limit to the University Hospital. Plaintiff submitted a supplemental memorandum contesting the constitutionality of the amendments. During the

lower court proceedings plaintiff never asserted, even in passing, that the UGIA unconstitutionally deprived her of a remedy against state employees. Plaintiff did not even cite that portion of the UGIA extending immunity to state employees. Rather, the immunity of state employees was never an issue at the trial level.

On appeal plaintiff now seeks to raise the employee-immunity issue for the first time. This is completely inappropriate. This Court has repeatedly emphasized that defenses, claims, and issues not raised at the trial level cannot be considered for the first time on appeal. See Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); Pratt v. City Council, 639 P.2d 172, 173 (Utah 1981). "This general rule applies equally to constitutional issues," Pratt, 639 P.2d at 173-74, and also to appeals from lower court rulings on summary judgment motions. See e.g., Schaer v. State, 657 P.2d 1337, 1341-42 (Utah 1983); Villeneuve v. Schamanek, 639 P.2d 214, 215 (Utah 1981); Clegg v. Lee, 30 Utah 2d 242, 516 P.2d 348 (1973). Plaintiff "did not . . . raise [her employee-immunity issues] before the trial court and has therefore waived any right to present them on appeal." Crookston v Fire Ins. Exch., 817 P.2d 789, 800-01 (Utah 1991).

Additionally, plaintiff has devoted only 1½ pages of her brief to the new issue of employee immunity. Within this limited space plaintiff simply assumes, without support, that the law favors her position. As the brief of the Attorney General demonstrates, the new issue raised by plaintiff is difficult and complex and cannot be decided in conclusory fashion.

In order to succeed on her new issue plaintiff must prove two essential points. First, plaintiff must prove that she had a remedy against state physicians at common law. Plaintiff's brief does not address this issue in the slightest, but simply concludes that the element is satisfied. Appellee's brief, p. 24. Plaintiff's self-serving conclusion is far from sufficient to prove beyond a reasonable doubt that the UGIA is unconstitutional. The Attorney General's brief demonstrates that state employees had a broad grant of immunity at common law. Employee immunity was determined by applying a discretionary/ministerial function analysis. This analysis has not even been mentioned by plaintiff. In order to apply the discretionary/ministerial function analysis to the instant case it would be necessary to research and brief the issue to the same extent that the parties have researched and briefed the governmental/proprietary function distinction. The parties cannot possibly perform the necessary research and briefing at this stage in the appellate proceeding.

In addition to showing the existence of a common law remedy, plaintiff must also prove that the UGIA deprived her of the remedy without providing a comparable substitute. Plaintiff's brief similarly fails to address this element and again simply concludes that the element is satisfied. Appellee's Brief, p. 25. Plaintiff cannot satisfy her burden of proof on such assumptions. The issue of whether a substitute remedy is adequate requires extensive research and briefing, as demonstrated in the brief of the Attorney General. The reasonableness of a substitute remedy cannot be based upon monetary value alone, but must also consider the fact that the

new remedy substitutes a solvent defendant for a potentially bankrupt defendant and eliminates the hassles and expenses associated with multiple-defendant lawsuits. Plaintiff has not demonstrated that her alleged remedy against the resident intern was substantially greater than her remedy against the state.[2]

Plaintiff's new issue is beyond the scope of this appeal, as evidenced by the parties' issue statements and the record below. The issue cannot be discussed without extensive research and briefing. If the Court rules on this new issue based only upon plaintiff's unsupported conclusions, the Court could be led into the same type of error caused by inadequate briefing in Condemarin.

The merits of plaintiff's new issue are questionable at best in light of the fact that none of the numerous cases cited by defendants have acknowledged the issue. However, if this Court is inclined to accept plaintiff's new argument it should do so in another case where the employee-immunity issue has been fully researched and briefed. Plaintiff has waived her right to raise the issue in this case.

C. THE DAMAGE LIMITATION DOES NOT VIOLATE DUE PROCESS AND EQUAL PROTECTION.

Plaintiff devotes the remaining portion of her brief to arguing that the UGIA's liability limit of $250,000 violates due

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[2] Notwithstanding the fact that plaintiff Shelly Hipwell has passed away, her family will continue to receive $1,315 a month until July 1, 2009; $15,000 a year for four years beginning on July 1, 2003; and $21,500 a year for four years beginning on July 1, 2007. (R. 216). The burden of proof is on plaintiff to show that she could have recovered more than this from the resident intern that performed her operation, who was capable of filing for bankruptcy. Plaintiff has not satisfied her burden of proof on this point.

process and equal protection. None of the various arguments raised by plaintiff are valid, as shown below.

1. The Rational Basis Standard Should be Used to Scrutinize the UGIA.

Plaintiff argues that the UGIA should be scrutinized under the "strict scrutiny" standard of review even if the "open courts" clause has not been violated. Plaintiff claims that strict scrutiny is appropriate because "the damage limitation [in the UGIA] severely restricted the important substantive right of an individual to recover for personal injuries." Appellee's brief, p. 27. Plaintiff further claims that the right to recover for personal injuries is a property right separately protected by the due process clause, without any reliance upon the "open courts" clause. This represents a pure substantive due process argument.

As Justice Stewart pointed out in Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989), substantive due process analysis is largely a thing of the past and constitutes an illegitimate exercise of judicial power:

> The era of federal substantive due process analysis ended shortly after Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). That era stands as the high water mark of an ill-fated and, I believe, illegitimate exercise of judicial power in the realm of legislative power. I strongly oppose any effort to put this Court on that track for a variety of reasons, including my view of separation of powers. Although substantive due process has not been wholly abandoned in some states, including Utah, it has by and large only been employed in cases of extreme arbitrariness, and this is not such a case.

Id. at 369 (Justice Stewart).

Plaintiff cannot prevail on her substantive due process claim. In Condemarin three justices rejected the notion that the due

process clause contains a substantive right to a remedy for personal injuries. See Id. at 369, 378 (J.J. Stewart, Hall, & Howe). Even the remaining justices, who favored substantive due process analysis, found that a violation of the "open courts" provision was necessary to invoke the doctrine. See Id. at 357, 366-68 (J.J. Durham & Zimmerman).

As shown repeatedly throughout defendants' briefs, the UGIA does not violate the "open courts" provision of the Utah Constitution. Consequently the UGIA will be scrutinized under the "rational basis" standard of review rather than the "strict scrutiny" standard advanced by plaintiff. When the "open courts" provision is not violated directly plaintiff cannot use the provision indirectly to obtain a heightened level of scrutiny under due process and equal protection analysis. See Estate of Cargill v. City of Rochester, 406 A.2d 704, 707 (N.H. 1979) (discussed on pp. 37-38 of Sharp's original brief).

Significantly, plaintiff has been unable to cite a single case where a governmental immunity act was invalidated under substantive due process analysis. In contrast, defendants have cited numerous cases upholding governmental immunity acts and their liability limits under all types of constitutional attacks. The overwhelming majority of case precedent is clearly in defendants' favor. Plaintiff's substantive due process argument lacks sufficient legal grounds to avoid awarding summary judgment to defendants.

2. The Damage Limitation in the UGIA is Constitutional Under a Rational Basis Standard of Review.

When determining whether a statute violates the equal protection or due process clauses the courts apply one of three levels of scrutiny to the statute. As pointed out throughout Condemarin, the level of scrutiny applied depends on the type of constitutional right infringed upon. Generally speaking, statutes that infringe upon fundamental rights (under due process analysis) or discriminate based upon the suspect classes of race and alienage (under equal protection analysis) are subject to "strict scrutiny." In strict scrutiny cases the statute will only be upheld when the statute is necessary to accomplish a compelling government objective, and even then the statute must utilize the least restrictive alternative available. Statutes that infringe upon important constitutional rights (under due process analysis) or that discriminate based upon sex, illegitimacy, or alienage (under equal protection analysis) are subject to mid-tier scrutiny. In those cases a statute will be upheld when the statute is substantially related to an important government objective. All other statutes receive mere "rational basis" scrutiny, where the statute need only be rationally related to a legitimate government objective. See generally Condemarin, 775 P.2d at 354-360 (J. Durham); Id. at 368 (J. Zimmerman); Id. at 373 (J. Stewart); Id. at 380-81 (J.J. Hall & Howe). Under rational basis scrutiny the Court is very deferential to the legislature. See Id. at 354, 359.

The rational basis standard is, beyond doubt, the appropriate standard of scrutiny to use in this case. All of the justices in

Condemarin agreed that the liability limit in the UGIA did not interfere with a fundamental right so as to be subject to strict scrutiny. See Id. at 354, 266, 373, 378. While three justices in Condemarin did apply mid-tier scrutiny, they all did so upon the belief that the UGIA conflicted with the "open courts" provision of the Utah Constitution. The justices seemed to recognize that, absent a conflict with "open courts," the UGIA would be subject to mere rational basis scrutiny. See e.g. Id. at 354, 373.

In this case the 1987 UGIA does not conflict with the "open courts" provision. Consequently the 1987 UGIA should be scrutinized under the rational basis standard of review.

Plaintiff argues that the UGIA would be unconstitutional even under the rational basis standard of review because a "less drastic alternative was available" and because the liability limit was not "urgently and overwhelmingly necessary" for the protection of the public treasury. This argument is invalid on its face. Only the strict scrutiny standard of review considers whether there is a "less drastic alternative" and whether a statute is "necessary." Such considerations do not apply under rational basis scrutiny, where a statute is only required to be rationally related to a legitimate government objective. Plaintiff has confused the differing standards of review.

Plaintiff also argues that "appellants made no showing in the court below that the damage limitation was necessary to preserve the public treasury." Appellees' brief, p. 31 (emphasis added). Besides the fact that a showing of "necessity" is not required under the rational basis standard, plaintiff's argument must also

fail for the reason that the burden of proof is upon plaintiff, and not defendants, to show that the UGIA is unconstitutional. Again plaintiff is attempting to improperly shift her burden of proof to defendants.

Plaintiff argues that "issues of fact exist" that prevent this Court from determining whether the rational basis test is satisfied. Plaintiff fails to realize that the rational basis test is a legal standard of review to be decided by the Court.

The UGIA is certainly constitutional under the rational basis standard of review. It cannot be realistically questioned that the state has a legitimate interest in protecting public funds. Nor can it be realistically questioned that the UGIA does in fact protect public monies. Consequently, the UGIA is rationally related to a legitimate government objective so as to satisfy the rational basis test.

Protection of the public treasury is not the only government objective furthered by the UGIA. The UGIA allows the state to provide high-risk medical care that is unavailable at private institutions because of the fear of malpractice claims. The UGIA's liability limit also helps the state attract quality physicians and specialists into Utah to work at the University Medical Center. In addition, the liability limit makes it possible for the state to operate a medical school for the benefit of its citizens, thus fulfilling its constitutional mandate of providing institutes of higher learning. See Utah Const. art. X, §§ 1, 4.

Nearly every court considering the constitutionality of a statutory limit on a state's liability has applied the rational

basis test and has concluded that the test is satisfied. Condemarin is one of the rare exceptions. There, the plurality applied mid-tier scrutiny because they were led to believe that the UGIA conflicted with the "open courts" provision of the state constitution. In virtually every other case the statutory liability limit has been upheld, as demonstrated by the many authorities already cited in defendants' briefs. Numerous other examples can be found by referring to the annotation in 43 A.L.R. 4th 19 (1986), where the cases are so one-sided that they are summarized as follows:

> Courts have almost uniformly recognized that legislative bodies have the power to prescribe [liability] limits, and that the limits prescribed are constitutionally valid. Though they may abridge the remedies of victims of government, as opposed to private torts, damage limitation statutes or ordinances are almost unanimously viewed as having a rational basis in the government's need to provide for effective risk management. . . . In addition to repelling equal protection attacks on damage limitation laws, the courts have also consistently rejected arguments that such enactments violate due process, or that they abridge state constitutional guarantees of access to courts for redress of grievances, or impair vested rights.

Annot., 43 A.L.R. 4th 19, 25 (1986) (emphasis added).

The overwhelming precedents cited by defendants stand in shocking contrast to the sparse authority offered by plaintiff. In all of her briefing, both at the trial level and on appeal, plaintiff has only cited two cases holding that a statute limiting the liability of the state is unconstitutional. One of these cases is Condemarin which, as already discussed, was based upon an assumption that the UGIA violated the "open courts" clause. The other case is Pfost v. State, 713 P.2d 495 (Mont. 1985). Pfost is

inapplicable to this case because it was decided after the State of Montana passed a constitutional amendment that "swept aside all notions of governmental immunity, and provided . . . '[that] the state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property.'" Id. at 499, quoting Montana Const. art II, § 18. Prior to the amendment "the State and its agents enjoyed total immunity from suit or tort action[s]. . . ." Id. Pfost is thus blatantly distinguishable from the case at hand.

Plaintiff has also cited to Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). Arneson has absolutely no application to this case because it did not involve a government entity and did not involve a governmental immunity statute. Instead, Arneson involved a private entity under a medical malpractice statute. This also holds true for each of the six cases that plaintiff string-cited in footnote 2 of her brief. As defendant's original brief has adequately demonstrated, and as plaintiff has failed to rebut, the overwhelming majority of courts have upheld statutes limiting the liability of state entities under a governmental immunity act.

In light of the foregoing it is apparent that the trial court erred in concluding that the amended UGIA is unconstitutional. The trial court's decision should be reversed and summary judgment should be entered in defendants' favor.

3. The 1987 Amendment Cured any Constitutional Defect that Existed in the UGIA Prior to the Amendment.

Plaintiff's final argument alleges that the 1987 amendment did not remedy the constitutional defects held to exist in the UGIA by

Condemarin. In support plaintiff advances two arguments, neither of which survive scrutiny.

(a) The 1987 amendment was not intended to eliminate the varying classifications created by the UGIA.

Plaintiff argues that the amended UGIA is unconstitutional because the 1987 amendment does not eliminate the differing treatment given to victims of government tort feasors and victims of private tort feasors. Plaintiff does not understand the purpose and effect of the 1987 amendment.

Plaintiff incorrectly assumes that the UGIA must eliminate all classifications and differing treatment in order to be constitutional. If this were so a large number of the state's current statutes would be unconstitutional, including its welfare statutes. The fact that a statute treats individuals differently does not mean that the statute is unconstitutional, but simply means that the statute will be subject to judicial scrutiny. The level of scrutiny applied depends upon the right that is infringed upon. The 1987 amendment is not intended to eliminate the UGIA's varying classifications, but is rather intended to decrease the level of judicial scrutiny by eliminating conflict with the "open courts" provision. This is accomplished by defining all state activities as "governmental functions." By eliminating conflict with the "open courts" provision the 1987 amendment reduces the level of scrutiny applied to the UGIA from "mid-tier" to "rational basis," which is the crucial issue, as recognized by Justice Durham. See Condemarin, 775 P.2d at 359 ("The crucial issue in such cases remains which standard of review the Court chooses to apply").

(b) The power to define "governmental function" is vested in the legislature.

As demonstrated, at common law state entities could not be sued without the state's consent. The UGIA provides the statutory scheme needed to sue the state. Under the legislature's plan the state first retains all of its immunities by extending immunity to "governmental functions," which are defined to include all state activities. The state then waives its immunity up to $250,000.

Plaintiff challenges the legislature's power to define "governmental function" under its own statutory scheme. By so doing, plaintiff also challenges the state's right to determine which of its entities will be subject to suit. Plaintiff's arguments constitute a challenge to the entire common law doctrine of sovereign immunity, which gives the state exclusive power to determine when it will be subject to suit. This Court has previously held that "sovereign immunity is not unconstitutional," and therefore plaintiff's arguments must fail as a matter of law. Madsen v. Borthick, 658 P.2d 627, 629 (Utah 1983).

Plaintiff argues that the state will be able to abuse its immunities if it is allowed to define its own activities as "governmental functions." Significantly, plaintiff cannot point to any existing abuse of legislative power, but simply poses hypotheticals. If this Court is concerned that the legislature might abuse its power in the future, the Court should wait until such an abuse of power is manifest before striking down the UGIA. The legislature has controlled governmental immunity since the time of

statehood without any abuse of power. More than likely no abuse will ever be manifest.

The UGIA itself is not an abuse of legislative power. Rather, the UGIA is the result of extensive research into the best way to balance an individual's need for a remedy with the state's need for solvency. Prior to its adoption the UGIA was subjected to extensive study, research, debate and analysis, as evidenced by legislative history:

> The 1963 legislature directed the Council to study the effects upon states, their political subdivisions and municipal corporations of waiver of immunity from suit and consenting to be liable for the torts of its officers, employees, and agents. . . . The legislature considered this study of such importance that it separately appropriated the sum of $25,000 and directed the Council to appoint a committee. . . .
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> * * *
>
> Research activities include field investigations, gathering of data, assimilation of information, formulation of proposals, drafting of legislation, and the preparation of a final report. Investigations of the claims experience of the state and its political subdivisions has been included in the Committee study. The extent of insurance coverage by governmental entities, the cost of such insurance and claims experience have been part of the study. Questionnaires were sent to other states in regard to tort claims and consequential damage claims. The statutes of other states have been reviewed and catalogued. The Utah Code has been carefully examined, section by section. Case decisions have been studied. Conferences have been held with insurance personnel and rating information has been obtained from the National Bureau of Casualty Underwriters. Seven working drafts of legislation have been prepared and studied by the staff, by committee members, and by the executive committee.
>
> The committee considered the important questions of whether governmental immunity from suit was important in the state and whether legislation was needed.

Addendum, pp. 16-17 (Report and Recommendations of the Utah Legislative Council, 1963-1965) (emphasis added).

Legislative history further shows that the state was aware of the need to provide its citizens with a remedy against the state. However, the legislature was also concerned that providing new remedies might be too burdensome:

> Numerous citizens have been injured in their person and property by negligent acts of government employees and by the construction of public improvements. In many of these cases no recourse against the governmental entity has been possible. It was found that the present [common law] system works substantial injustice to citizens. There is fear, however, among government officials, that to open the door to unrestrained claims would be too burdensome upon governmental funds.

Addendum, p. 17. See also Addendum, pp. 9-14 (Legislature had real fear that unlimited waiver of immunity would overwhelm state).

The UGIA represents a balance between the tort victim's need for a remedy and the state's need for solvency. This balance was struck by codifying the state's common law immunity and then waiving the immunity up to a limited amount. The courts are only given jurisdiction to determine the state's liability where immunity has been waived:

> This legislation reaffirms the rule of governmental immunity, thus eliminating any confusion in the law, and then carves out specific exceptions where, as a matter of justice, immunity from suit should be waived. No effort is made in the bill to create new or unique rules of substantive liability as far as governmental agencies are concerned. Where immunity is waived, liability or responsibility would then be determined by the courts.

Addendum, p. 19 (emphasis added).

The legislature concluded that the UGIA's "part-way [waiver of immunity] does protect the citizens of our state." Addendum, p. A-13.

As shown above, the UGIA was intended to benefit the citizens of Utah by providing them with a remedy against the state where none previously existed. The UGIA is not an abuse of legislative power. The legislature acted in good faith when it adopted the UGIA and the legislation should be upheld.

Plaintiff also argues that "the legislature cannot by fiat make everything a governmental function. . . ." Appellee's brief, p. 36. However, plaintiff cites only two cases, neither of which support her argument. Rather, both cases support defendant's claim that the legislature can define "governmental function."

The first case plaintiff cites is Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980). In Standiford this Court derived a test to be used for determining whether a government entity is performing a "governmental function" under the UGIA. At the time the test was created the term "governmental function" was not defined by the UGIA. The 1987 amendment remedied this defect by defining "governmental function." Plaintiff argues that the Standiford definition of "governmental function" should prevail over the legislature's definition. This is incorrect. In Standiford this Court made it clear that it was defining "governmental function" only because the UGIA "gives this Court the power to define understandably and logically the term "governmental function." Id. at 1235. The Court then defined "governmental function" in the manner that it believed to be "consistent with the plain legislative intent in [the UGIA]." Id. at 1237.

Additionally, Standiford recognized that the legislature could define "governmental function" to include government-owned hospitals and thereby overrule prior case precedent to the contrary:

> Subsequent to the decision in Greenhalgh v. Payson City, supra, § 63-30-3 was amended to specifically exempt governmentally-owned hospitals. . . . To the extent that Payson City is now covered by § 63-30-3, the holding in Greenhalgh has been legislatively overruled.

Id. at 1232 n.1.

Standiford thus shows that the Court will yield to the legislature when it comes to defining "governmental function."

The second case cited by plaintiff is Hansen v. Salt Lake County, 794 P.2d 838 (Utah 1990). Hansen involved a 1984 amendment to the UGIA that included flood control activities within the definition of "governmental function." This Court allowed the legislature to amend the definition of "governmental function" to include flood control activities and upheld the UGIA, stating that:

> We are persuaded that the weight of logic, legislative history, and constitutional imperatives supports the conclusion that the amendment does no more than define flood control activities to be governmental functions.

Id. at 845-46.

Additionally, although the 1987 amendment was not at issue, this Court seemed to recognize that the amendment is authoritative:

> The term "governmental function" was not defined by the Act until 1987. . . . Until 1987, the scope of the term was defined by our case law, as it had been before the Act was passed.

Id. at 842-43 (citations omitted; emphasis added).

Standiford and Hansen, along with approximately 24 other cases cited in Sharp's original brief, all suggest that the legislature can define "governmental function." Plaintiff has completely

failed to cite any authority to the contrary. Plaintiff's lack of authority demonstrates the weakness of her argument and makes it impossible for her to overcome the presumption of validity attached to the 1987 amendment. The overwhelming majority of cases hold that the legislature can control the entire field of governmental immunity, including the definition of "governmental function."

In this regard, it is important that this case be decided on the legal merits and not on personal opinions regarding the value of governmental immunity. The control of governmental immunity is undisputedly vested in the legislature alone. The legislature is uniquely capable of performing the extensive studies necessary to properly balance the competing interests involved in governmental immunity issues. Prior to adopting the UGIA the Utah Legislature engaged in such studies and determined that the UGIA strikes the proper balance. The citizens of Utah have placed their trust in their legislators to make this determination. The UGIA should not be overturned simply because the Court thinks that the Act is unwise or unfair:

> This Court cannot ignore or strike down an act because it is either wise or unwise. The wisdom or lack of wisdom is for the legislature to determine. If the act is unjust, amendments to correct the inequities should be made by the legislature and not by judicial interpretation. Years of study and millions of dollars have been spent on research and study . . . , and the legislature is able to profit by these efforts when considering legislation on the subject. If after considering the reasons for and against a bill, the legislature enacts it into law, arguments for correction of any claimed inequities should be addressed to the legislature where they can be considered and if found to exist, be corrected.

Masich v. United States Smelting, Ref. & Mining Co., 113 Utah 101, 126-27, 191 P.2d 612, 625 (1948).

If this Court goes against the great weight of authority and overturns the UGIA and its liability limit, the Court will be stripping the control of governmental immunity from the legislature and vesting that control in the judiciary. Such an act would violate the separation of powers clause of Utah Const. art. V, § 1. See Cobia v. Roy City, 12 Utah 2d 375, 377-78, 366 P.2d 986, 988 (1961). Such an act would also increase the confusion that already exists in the governmental immunity arena because of contradictory statutes and judicial opinions.

CONCLUSION

Plaintiff has failed to cite a single case supporting her argument on any material issue. The overwhelming weight of authority shows that the liability limit contained in the 1987 UGIA is constitutional. The trial court erred in concluding otherwise. Defendant therefore urges this Court to reverse the trial court.

DATED this 28th day of December, 1992.

STRONG & HANNI

By _____
Glenn C. Hanni

By _____
David R. Nielson

Attorneys for Defendant Roger T. Sharp

104520bc

ADDENDUM

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

ARTICLE V

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

UTAH CODE
ANNOTATED

CHAPTER 30
GOVERNMENTAL IMMUNITY ACT

63-30-2. Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

History: L. 1965, ch. 139, § 2; 1973, ch. 103, § 2; 1978, ch. 27, § 1; 1981, ch. 116, § 1; 1983, ch. 129, § 2; 1987, ch. 75, § 2; 1987 (1st S.S.), ch. 4, § 1; 1988, ch. 2, § 338.

Amendment Notes. — The 1987 amendment alphabetized the definitions of this section and renumbered the subsections accordingly, added present Subsection (4), and made minor changes in phraseology and punctuation.

63-30-3. Immunity of governmental entities from suit.—Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function.

History: L. 1965, ch. 139, § 3.

(Original -- 1965)

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this act, all governmental entities [~~shall be~~] are immune form suit for any injury which [~~may result form the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function~~] results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility.

(1978 amendment)

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

History: L. 1965, ch. 139, § 3; 1978, ch. 27, § 2; 1981, ch. 116, § 2; 1984, ch. 33, § 1; 1985, ch. 93, § 1.

Amendment Notes. — The 1985 amendment inserted "and other natural disasters" in the second paragraph.

(Controlling statute)

63-30-34. Limit of judgment against governmental entity or employee.

(1) Except as provided in Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the injury is characterized as governmental.

(2) Except as provided in Subsection (3), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $100,000 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

(3) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property without just compensation.

LAWS

OF THE

STATE OF UTAH,

PASSED AT THE

FIFTH REGULAR SESSION

OF THE

Legislature of the State of Utah.

HELD AT

SALT LAKE CITY, THE STATE CAPITAL, IN JANUARY, FEBRUARY AND MARCH, 1903.

PUBLISHED BY AUTHORITY.

Press and bindery of
THE SKELTON PUBLISHING CO.,
Provo, Utah.

CHAPTER 114.

KINDERGARTENS.

AN ACT providing for the establishment and maintenance of kindergartens, in all school districts of a population of two thousand and upwards.

Be it enacted by the Legislature of the State of Utah:

SECTION 1. **Kindergartens provided for.** All school districts of a population of two thousand and upwards, shall hereafter establish and maintain, one or more kindergartens, in said school district; open to children resident therein, between the ages of four and six years. Said kindergartens must be established within four years after the passage of this act.

Sec. 2. **How maintained.** The cost of maintaining such kindergartens shall come out of the district school fund, of the respective districts.

Sec. 3. This act shall take effect July 1st, 1903.

Approved this 16th day of March, 1903.

CHAPTER 115.

STATE MENTAL HOSPITAL.

AN ACT amending chapter 7, title 61, Revised Statutes of Utah, 1898, relating to the government and control of the State Mental Hospital and providing for the care and treatment of the insane.

Be it enacted by the Legislature of the State of Utah:

SECTION 1. That chapter 7, title 61, Revised Statutes of Utah, 1898, be and the same is hereby amended to read as follows:

Sec. 2153. **Location.** Until otherwise provided, the State Insane Asylum now established and located at Provo City, in the county of Utah, shall be hereafter known as the State Mental Hospital.

Sec. 2154. **Objects.** The objects of the hospital shall be to care for all insane persons residing within the State, and to furnish to them proper attendance, medical treatment, seclusion, rest, restraint, entertainment, occupation and support tending to restore the mental and physical health of such persons or to alleviate their sufferings.

Sec. 2155. **Board of Insanity.** The government and control of the State Mental Hospital shall be vested in a board, to consist of the Governor, State Treasurer and State Auditor, which shall be known as the Board of Insanity.

Sec. 2156. **Id. Traveling expenses.** Each member of the board shall be allowed his traveling expenses in attending the meetings of the board, payable out of any money in the treasury of the hospital.

Sec. 2157. **Id. Powers.** The board may contract and be con-

THE

COMPILED LAWS OF UTAH

THE DECLARATION OF INDEPENDENCE

AND

CONSTITUTION OF THE UNITED STATES

AND

STATUTES OF THE UNITED STATES LOCALLY

APPLICABLE AND IMPORTANT.

COMPILED AND PUBLISHED

BY AUTHORITY.

VOL. I.

SALT LAKE CITY:
HERBERT PEMBROKE, BOOK, JOB AND LEGAL BLANK PRINTER, 72 EAST TEMPLE STREET.

1888.

CHAPTER VIII.

INSANE ASYLUM.

§ 1940. s 1. There shall be established upon a site to be selected by the board of directors hereinafter provided for, and institution for the care and treatment of the insane, to be designated and known as the Territorial Insane Asylum. Territorial Insane Asylum established.

Senate Debate on the Utah Governmental Immunity Act

January 18, 1965

Senator Welch (introducing the bill):

Now, I'd like to, I'd like to very briefly, uh, explain to you the experience that has occurred in our neighboring states. And this is one of the reasons why, in my opinion, it is very important that we act upon this bill.

About a year, about two years ago now, the Supreme Court of the State of California, by a court order in response to a, a case, a specific case brought before that court, just by a court rule and court order abolished -- completely abolished -- governmental immunity in that state. Within overnight practically, that state was besieged with millions of dollars worth of suits and claims against the State of California and its entities. This matter was of such great importance to the people of the State of California that a, that a special session of the legislature of the State of California was called. And that special session passed a moratorium on suits against the government of the State of California or its entities. And this moratorium was for a year's time, until such time as they could make a study and come back with recommendations to the legislature.

They did come back and they did make recommendations and they did pass a bill. They passed a series of bills, a very complex series of bills. We have, we have had the benefit of those bills. We have studied them. That those bills in that state, uh, that

legislature, set out immunity by statute in the State of California and as we go along you'll find out that's exactly what we've done. They set up immunity by statute and then out of the immunity the State of California, through its legislative process, carved out certain areas in which an action might be brought by the citizens of that state against the government of the State of California or its entities or subdivisions. This is a matter of controlling, to a certain extent, rather than leaving the thing wide open.

I would like to also emphasize that about a year ago in the State of Arizona the Supreme Court did exactly the same thing. And I could read you that decision if you like, I have it here, but I'm not going to bore you with it. But the supreme court in essence said this: The rule of governmental immunity is a rule that has been set up and adopted by the courts. It is not a statutory creature and therefore it can be abolished by the courts and we therefore abolish statutory or I mean governmental immunity from suit in our state.

I was on a panel with the assistant director of uh, the legislative council of the State of Arizona. This was about two months ago over in the State of Wyoming at the Western Conference of the Council of State Governments. I was uh, chairman of the panel in connection with governmental immunity and I have there, on the panel with me, this man from Arizona. We also had a professor from the State of California whose is largely responsible for the, for the research and work that went into the California act. This

man from Arizona said immediately upon the, upon the, uh, abolition or striking out and, uh, overruling of governmental immunity in their state by this court order, that they were beset by Six Million Dollars worth of suits. And they are very anxiously working and planning to solve the problem such as the way California did. And I have provided them with materials which we have, which we have uh, been able to develop in this state.

Now, this isn't all. About six months ago the court of the State of Nevada did exactly the same thing. Now I want to merely point out to you, what I'm trying to point out to you and trying to get over to you is the fact that a court order or a court decision which completely waives and does away with the doctrine of governmental immunity then throws the doors wide open to all and every kind of suit that might be brought. And I'd like to, to state that, that our approach to this matter has been to take a middle of the road course. To open the door for those people where there's obvious uh, serious handicap to the individual who has been injured, but not to leave it open, that door wide open so that it will be detrimental to the interest of the state and its subdivisions.

Tape No. 2, Lines 8.3 to 14.5.

* * *

Now I'd like to, after going through that general, general discussion, I'd like to just, just briefly run through some of the provisions of this bill and I'll appreciate it if you'll turn to

the bill. It's Senate Bill 4, Senate Bill 4 in your file there. Now if you'll note the first part of this bill just has to do with definitions and I don't think we'll need to spend any time on that. Section 2, if you'll read it, reaffirms for this state the doctrine of governmental immunity. It does it by statute. We do not have governmental immunity by statute in the State of Utah. We have governmental immunity only by reason of having the court having said so. And therefore the court could waive it if it wanted to. So we reaffirm in this statute, in this bill, the doctrine of governmental immunity, Section 2. I'm, I'm uh, I think I'm wrong. Section 3. Section 3. It says "Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activity of said entity wherein said entity is engaged in the exercise and discharge of a governmental function." Now, we reaffirm that and then later on we carve out of that immunity various areas.

Tape 2, Line 24 to 26.

* * *

I have uh, uh, about gone through this bill uh, gentlemen. I want to assure you that, that in my opinion this is a necessary bill. I think that it will not hurt the State of Utah or its subdivisions. I think that it will be helpful because I think that uh, we have just as much a possibility of the court, the courts taking this matter into their hands and determining that there is, that there should be a doing away with this doctrine. I'm not

going to foretell when and how, but it has happened in the surrounding states and I think that this, this approach that we have seen is the reasonable approach. It is not, it is not opening the door all the way, and I've said this about three times and I want to emphasize it, it is not opening the door all the way to allowing suits of every kind against the state and its entities. It opens it part-way. But this part-way opening does protect the citizens of our state.

Tape 3, Line 20 to 22.

SENATE CHAMBER
STATE OF UTAH
SALT LAKE CITY

CERTIFICATION OF LEGISLATIVE TRANSCRIPT

I hereby certify that the attached document consisting of 5 signed pages is a true and authentic verbatim record of the discussion of Senate Bill/House Bill No. S.B. 4 which occurred in the Senate Chamber during the General Legislative Session on 1/18/65 and is recorded on Disk/Tape No. 2&3 in the Senate Office.

Annette B. Moore
Name

Leadership Secretary
Title

9/23/92
Date Certified

STATE OF UTAH

Report and Recommendations of the Utah Legislative Council 1963-1965

PURSUANT TO TITLE 36, CHAPTER 4, SECTIONS 2 AND 11, UTAH CODE ANNOTATED 1953

SALT LAKE CITY, UTAH
DECEMBER, 1964

the court in habitual truancy cases, clarification of the role of the probation officer, provision for some publicity in major delinquency cases, clarification of the general purpose statement, definitions of neglected and dependent child, qualifications of the probation staff, additional judgeship for the second district and appointive powers of the senior judge, also, designation of the chief probation officer and defining action where adults contribute to the delinquency of a juvenile.

The Committee recommends the Juvenile Court Act as representing an effective, efficient, and conscientious effort on the part of well-qualified individuals who have worked to prepare a bill in the best interests of the State.

Governmental Immunity

The 1963 Legislature directed the Council "to study the effects upon states, their political subdivisions and municipal corporations of waiver of immunity from suit and consenting to be liable for the torts of its officers, employees, and agents as outlined in H.J.R. 21 of the 35th Legislature." (S.J.R. 14, item 2.) The Legislature considered this study of such importance that it separately appropriated the sum of $25,000 and directed the Council to appoint a committee with at least one-third of the membership from the legal profession. The Council appointed a committee of twenty-one members, with representation from the Legislature, the cities, counties, special taxing districts, school districts and other interests.

Bills have previously been introduced in the Legislature to waive governmental immunity. In 1961 a bill was passed, then vetoed by the Governor and in 1963 a bill was introduced but failed to pass.

Research activities include field investigations, gathering of data,

assimilation of information, formulation of proposals, drafting of legislation, and the preparation of a final report. Investigations of the claims experience of the State and its political subdivisions has been included in the Committee study. The extent of insurance coverage by governmental entities, the cost of such insurance and claims experience have been part of the study. Questionnaires were sent to other states in regard to tort claims and consequential damage claims. The statutes of other states have been reviewed and catalogued. The Utah Code has been carefully examined, section by section. Case decisions have been studied. Conferences have been held with insurance personnel and rating information has been obtained from the National Bureau of Casualty Underwriters. Seven working drafts of legislation have been prepared and studied by the staff, by Committee members, and by the Executive Committee.

The Committee considered the important questions of whether governmental immunity from suit was important in the State and whether legislation was needed.

Numerous citizens have been injured in their person and property by negligent acts of government employees and by the construction of public improvements. In many of these cases no recourse against the governmental entity has been possible. It was found that the present system works substantial injustice to citizens. There is a fear, however, among government officials, that to open the door to unrestrained claims would be too burdensome upon governmental funds.

The Committee concluded that immunity of governmental entities should be waived in relation to responsibility for the negligent acts or omissions of public employees. The Committee was not unanimous in its opinion regarding responsibility for consequential damage. This latter type of claim is

for indirect or consequential damage resulting from the construction of public improvements. It is not necessarily the result of any negligence but is merely the consequence of a particular government activity.

The question of payment of claims was a matter of concern to the Committee. It was found that there is already a limited waiver of immunity in the State. For example, cities and towns can be sued and must respond in relation to defective streets, sidewalks, culverts, and bridges. The State Road Commission has discretionary authority to pay individual claims up to $3,000 for injuries resulting from the negligence of its employees. The Fish and Game Commission must pay for crop damage resulting from wildlife. It was also found that 83% of the political subdivisions responding to the survey already carry automobile insurance, and 30% of those carry comprehensive liability insurance.

On the basis of the best experience available, it appears that vehicle insurance premiums and costs will show little increase should immunity be waived, but there may be an increase of as much as five to six times in the cost of general liability insurance. There would probably be more claims filed and some additional administrative costs incurred in handling these claims.

There was unanimous approval by the committee members that governmental entities should be legally authorized to purchase liability insurance to protect both the entity and the employee.

At the present time claims against the State are reviewed by the Board of Examiners and then passed on to the Legislature for its review and appropriation or refusal. If a state agency is not otherwise authorized by law to pay claims, then the authority of the Board of Examiners must be recognized and claims must be channelled through the Board.

The Committee has prepared a draft of legislation patterned after that adopted in California and in some other states. This legislation reaffirms the rule of governmental immunity, thus eliminating any confusion in the law, and then carves out specific exceptions where, as a matter of justice, immunity from suit should be waived. No effort is made in the bill to create new or unique rules of substantive liability as far as governmental agencies are concerned. Where immunity is waived, liability or responsibility would then be determined by the courts.

A second bill has been prepared which is simply an authorization for the permissive purchase of liability insurance. This latter bill does not waive immunity. It would solve the problem of immunity only insofar as the governmental entity chooses to purchase liability insurance, thereby referring all claims to an insurance carrier.

If the Legislature meets the question of governmental immunity head-on, it can consider the comprehensive draft which defines specific exceptions to immunity and also provides for insurance coverage. The second draft merely permits the purchase of insurance coverage by the governmental entities.

The Committee recommends legislation to solve the problem of governmental immunity.

Justice of Peace

A follow-up to the study made by a State Bar Committee prior to the 1963 Legislature to determine the advisability of reforming the J. P. system was assigned to a committee of the Council. The Committee believes legislation is needed to accomplish the objectives of the assignment. The J. P. system is in need of reform and the Committee is preparing legislation to permit the establishment of "community courts."

CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 28th day of December, 1992, I caused to be hand delivered four true and correct copies of the foregoing to:

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